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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or transmission Antennas Designed To Provide Fixed Wireless Services	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC FOR NOTICE OF INQUIRY ON ACCESS TO PUBLIC RIGHTS-OF-WAY AND FRANCHISE FEES

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SUMMARY

The Telecommunications Act of 1996 allowed local governments to collect "fair and reasonable compensation" for use of the public ways, but did not intend for municipalities to charge whatever the market would bear. A franchise fee or right-of-way charge must be reasonably related to the incremental costs and burdens that installation of communications facilities might cause for state and local governments managing their rights of ways. Instead, many State and local government entities enforce requirements that violate Section 253(a) of the Act. Level 3 Communications, LLC routinely encounters fees and other obligations of State and local governments that are discriminatory as between new entrants and their incumbent competitors.

The Federal Communications Commission should urge the States to adopt model laws and regulations pertaining to franchises and right-of-way management. The Commission should also release workable rules interpreting Sections 253(a) and 253(b), emphasizing that franchise fees must be reasonably associated with costs to the government entity of accommodating the facility. The FCC rules should emphasize that discrimination between competitors and the incumbent in any market is inherently a barrier to entry.

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FOR NOTICE OF INQUIRY
ON ACCESS TO PUBLIC RIGHTS-OF-WAY
AND FRANCHISE FEES

Pursuant to Part 1, Subpart C of the Commission's rules, 47 CFR §§ 1.401-1.430, Level 3 Communications, LLC ("Level 3") respectfully submits these comments in response to the

Commission's Notice of Inquiry on Access to Public Rights-of-Way and Franchise Fees.[1] The Notice of Inquiry advised that the Commission seeks to compile a record regarding local rights-of-way management issues as they affect telecommunications service providers.

I. INTRODUCTION

Level 3 strongly supports the Commission's effort to examine the serious franchise fee and right-of-way problems encountered by telecommunications service providers. The key question for the Commission to answer is whether local governments are imposing franchise and right-of-way fees and restrictions that create barriers to entry or otherwise discriminate between providers. The answer to that question is a resounding yes, and FCC action is urgently required.

The Telecommunications Act of 1996 (the "Act") contained an unequivocal statement that state and local governments may not impose requirements that prohibit or have the effect of prohibiting entry.[2] The Act also provides that while States and local governments retain their authority to manage rights-of-way, they may only require compensation for such rights on a fair, reasonable, competitively neutral and non-discriminatory basis.[3] Section 253 of the Act is an even-

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1/ Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Promotion of Competitive Networks in Local Telecommunications Markets,* FCC 99-141 (rel. July 7, 1999) ("Notice of Inquiry").

2/ 47 U.S.C. § 253(a).

3/ *Id.*, § 253(b).

handed provision, as beneficial to State and local governments as it is to telecommunications providers. It protects the vital role of State and local governments in managing streets and highways, and preserves the ability of these governments to obtain "fair and reasonable" compensation from telecommunications users, as long as that compensation is "competitively neutral and non-discriminatory." Thus, Section 253 was intended to promote competitive entry. Unfortunately, some of the state and local government entities that most avidly profess to embrace telecommunications competition also impose unfair and unreasonable fees, and flaunt the non-discrimination provisions.

Level 3 is building an advanced fiber optic network, in order to offer services in over fifty local markets in the United States. When completed, Level 3's network will include 16,000 miles of inter-city route. Level 3's construction plan includes installation of numerous conduits throughout the network, of which only one will initially contain fiber optic cable. The rest of the conduits will be empty, to be filled with fiber as demand increases and technology improves. As it has built this network, Level 3 has accumulated experience with a wide variety of local governments and state agencies. The company welcomes this opportunity to share its experiences, in order to demonstrate the need for the FCC to adopt clarifying rules implementing Section 253.

II. ARGUMENT

A. Many state and local government entities enforce requirements that violate Section 253(a) of the Act.

The language of Section 253(a) is simple and broad. It reaches both direct and indirect circumstances that may limit the introduction of competition:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.[4]

Subsection (c) preserves state and local government powers with respect to the public rights-of-way, in providing as follows:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.[5]

Subsection (d) obligates the FCC to preempt, to the extent necessary, enforcement of any State or local government action that is inconsistent with subsection (a) or (b).[6]

Ordinances being enforced by local government entities are delaying the expeditious entry of newcomers like Level 3. In a competitive market, where new entrants must compete for both

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[4] *Id.*

[5] *Id.*, § 253(c).

[6] *Id.*, § 253(d).

financial capital and customers, delay can have the effect of prohibiting entry. In the *Notice of Inquiry*, the Commission expressed its belief that "most communities and carriers have arrived at solutions that both protect State and local governments' authority to manage the public rights-of-way and avoid imposing unreasonable or discriminatory burdens on competitive service providers."[7] Unfortunately, the Commission's optimism is not supported by Level 3's experience, which is that a very substantial number of municipalities impose an unreasonable and discriminatory franchise fee or right-of-way regime.

Municipal franchising authorities frequently assert that the requirements they impose on competitive carriers do not rise to the level of a prohibition, but only make production costs more expensive. In some instances, that argument is a thinly concealed effort to squeeze onerous and unfair franchise terms into the United States Supreme Court's caution in *AT&T v. Iowa Utilities Board* that a slight increase in the costs to a provider of one of its factors of production does not constitute a prohibition.[8] In *Bell Atlantic – Maryland v. Prince George's County, Maryland* ("*Prince George's County*"), the United States District Court for the District of Maryland saw the fallacy of that argument. The court noted that Section 253(a) does not merely proscribe local

[7] *Notice of Inquiry* at ¶ 79.

[8] *See, e.g.*, Response of Prince George's County, Md., *et al.*, to Comments by AT&T Communications of Md., and *Amicus* Memorandum of Sprint Communications Co. at 6-7, Bell Atlantic – Maryland, Inc. v. Prince George's County, Maryland, 49 F. Supp. 2d 805 (D. Md. 1999) (quoting *AT&T Corp. v. Iowa Utilities Board*, ___ U.S. ___, 119 S. Ct. 721, 735 (1999)).

regulations that prohibit the ability of an entity to provide telecommunications service, but also those requirements "that 'may . . . have the effect of prohibiting' the provision of such services."[9] As recognized by the court, a sufficient number of onerous requirements, such as were imposed by the Prince George's County government, may have the cumulative effect of creating an unlawful barrier to entry.[10] Moreover, if a new entrant must face significant annual recurring right-of-way fees that the incumbent does not pay, as is often the case, the effect of that discrimination may prohibit entry, because a new entrant may calculate that it cannot sustain competition against the incumbent with such a recurring cost disadvantage.

Many municipal governments impose franchise requirements that are just as numerous and onerous as those found to be a barrier to entry by the court in *Prince George's County.* For example, Level 3 has been asked, in one jurisdiction, to: (1) donate ten strands of fiber to the city throughout Level 3's entire local network; (2) donate up to $200,000 in telecommunications equipment; (3) pay the city 5% of its annual gross revenues, including revenues that have no relationship to use of the public ways, such as revenues from sales or leases of equipment; (4) agree to a minimum annual fee of $200,000; (5) agree to inspection of its books and records by the city (at company expense), including records that do not involve the company's use of the public ways or calculation of its gross

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[9] *Prince George's County*, 49 F. Supp. 2d at 814.

[10] *Id.* at 814-15.

revenues; (6) agree to restrictions on transfers of 10% or more of the company's voting stock; and (7) waive liability by the city for damages to Level 3 arising from the city's own negligence.

Another municipality demanded that Level 3 donate ten conduits for the city's use, and also pay an annual fee of $2.50 per linear foot of installed conduit in public rights-of-way, a fee that is not imposed on the incumbent carrier. Level 3 anticipates that this fee would result in the company having to pay approximately $130,000 each year to this one community, which is among dozens in a large metropolitan area. Perhaps the most problematic aspect of this example is the fact that the city intended to lease the donated conduit to Level 3's competitors. While Level 3 does not dispute the advantage of minimizing construction in city streets, the city should not be permitted to enter the private marketplace as a lessor of <u>donated</u> facilities. Such action would seriously impair free market factors. Realistic adverse consequences to Level 3 and other participants include the possibility of being put out of business by competitors using facilities constructed at Level 3's own expense.

Some other local government entities have not relented in their efforts to regulate companies such as Level 3. As an example, one county government in the Pacific Northwest demanded that Level 3 install an Internet point-of-presence in their locality. A Northeastern city requires that a company receiving a franchise open and maintain an office within the city limits.

Many cities require telecommunications service providers to file unconditional letters of credit to secure the provider's performance under a franchise. Such letters of credit are often for very large amounts, and sometimes extend for the entire term of the franchise.[11] Letters of credit must be purchased by the company from sureties at significant cost, and any credit facility available to the provider is usually reduced on a dollar-for-dollar basis by the amount of any such letter of credit that is outstanding.

Perhaps the most outrageous demand of any city government is that a new entrant waive rights it possesses under the Act as a condition of receiving a franchise. In at least one case known to Level 3, a city requires waiver of recourse to Federal courts and allows the city to impose early termination of the entire franchise if the compensation provisions are ever invalidated by a court, agency, commission or legislative body.

Although Level 3 resists all such unreasonable demands, the ability of new entrants to do so is limited. This is because local governments "whipsaw" one company against the other. Once a new entrant has committed to building its network in a given region, and has expended resources on State regulatory approvals, local governments have unfair and unreasonable bargaining power. This usually results in the municipality offering a franchise with onerous terms and refusing to make any meaningful changes. In many cases, delay will eventually bring about capitulation to the unreasonable terms. If one company does not agree to the onerous terms of a franchise, a late-coming competitor may do so, gaining an undeserved advantage of being first to market.

[11] One large Northeastern city requires a $250,000 letter of credit, in addition to a $750,000 performance bond.

B. *Discriminatory franchise ordinances violate Section 253(a), and are not merely a bar to the Section 253(c) safe harbor.*

Many state and local government entities appear to believe that their actions do not amount to discrimination under Section 253(a). Despite the fact that many of them impose no franchise fee at all on ILECs, they somehow argue that a different standard of treatment of the ILEC is justified. For example, it is clear from public documents available in the *Prince George's County* case that Bell Atlantic pays no franchise fee in Maryland.[12] Similarly, documents available in the *City of Dearborn*[13] case reveal that Ameritech does not pay franchise fees in Michigan. Level 3, from its own experience, has found that Bell Atlantic is exempt from franchise fees in all or part of New York State, and that Bell South also pays no such fees in much of its service territory. No doubt, there are many other jurisdictions in which the same is true. In spite of this, municipal governments in all of these jurisdictions attempt to impose franchise fees on competitive providers.

Municipal franchising authorities may very well fail to recognize the effect of their discriminatory conduct. Those jurisdictions that single out competitive carriers for franchise fees and other discriminatory conduct would have it believed that the issue of discrimination does not arise under Section 253(a) at all, but is only considered in the context of Section 253(c). Under this theory, it would appear that no amount of discrimination causes a violation of Section 253(a), so

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[12] *Prince George's County*, 49 F. Supp. 2d at 821.

[13] *TCG Detroit v. City of Dearborn*, 16 F. Supp.2d 785, 794 (E.D. Mich. 1998).

long as the local government entity does not expressly prohibit a new entrant from providing interstate or intrastate service. That contention is simply wrong.

Section 253(a) not only preempts local government requirements that prohibit the offering of service, but it also preempts requirements that have the effect of prohibiting offerings of interstate and intrastate service. If a local government entity imposes a franchise fee equal to 5% of gross revenues, as some attempt to do, that fee constitutes a very large part of the competitive carrier's costs. It is impossible to assess how many companies would decide they could not offer service because the profit margin was too small, but it must be assumed a cost of 5% of total revenues is a barrier to entry of at least some magnitude when many new entrants have operating costs that far exceed revenues in their early years of operation. The barrier to entry created by an excessive franchise fee may be complete, or it may be partial, as when a company decides not to offer a less-profitable service. In the latter case, the barrier to entry may affect only residential customers and others in lower-density neighborhoods. While it is true that Section 253 does not guarantee cheap right-of-way for competitive providers, a cost that is not imposed equally on all competitors is one that cannot, in a competitive market, be easily passed on to customers of the company that bears the greater cost. Therefore, to some extent, material costs imposed only on new entrants will have the effect of prohibiting the introduction of competition. The barrier to entry from this competitive disadvantage may either prohibit all service by some potential competitors or, perhaps, service from all competitors to some potential consumers.

C. *Section 253 does not prevent local governments from receiving fair and reasonable compensation from telecommunications providers for use of the public rights-of-way.*

Local governments retain the right under Section 253(c) to require compensation from telecommunications providers for use of the public rights-of-way. Section 253(c) requires, however, that such compensation be "fair and reasonable" and be assessed on a competitively neutral and nondiscriminatory basis.[14] In practical terms, this means that rights-of-way fees must be determined based on a local authority's actual costs of managing its rights-of-way, and that these expenses must be apportioned to individual providers based on their pro-rata share of those costs. Any greater amounts would exceed the municipality's authority and would be unlawful.

This conclusion is compelled by the legislative history of Section 253 of the Act. In the House version of the bill that eventually became the Act, the provision that ultimately became Section 253 contained a proposed "parity provision." This provision would have required all local governments to impose exactly the same flat rate or percentage-of-revenue fee on all telecommunications providers, irrespective of how much of the public rights-of-way they actually used.[15] The parity provision was specifically rejected in order to ensure that right-of-way fees reflected the different burdens and costs that the installation of different types of telecommunications

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14/ *See In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C. Rcd. 21396 at ¶ 108 (1997).

15/ *See* H.R. 1555, 104th Cong. § 243(e), 141 Cong. Rec. H8425-06, H8427 (Daily ed. Aug. 4, 1995).

networks would bring about in the local jurisdictions managing their public ways. Thus, in enacting Section 253 and rejecting the parity provision, Congress specifically rejected right-of-way fees based on a percentage of gross revenues and clearly mandated a "fair and reasonable" standard in Section 253(c) that requires franchise fees be based on the costs of managing public rights-of-way.[16]

Congress allowed local governments to collect "fair and reasonable compensation" for use of the public ways, but did not intend for municipalities to charge whatever they could get away with. The inclusion of the term "fair and reasonable" imposes a restraint on local governments, and implies something other than what a local government might produce on its own, without any pro-competitive guidance. A municipal franchise fee, to be fair and reasonable, must relate to the incremental costs and burdens that the installation of different types of communications facilities might cause for municipalities managing their rights-of-way. Indeed, any scheme that fails to charge providers based upon their proportional use of the public ways not only risks failing the "fair and reasonable" test, but is clearly not "competitively neutral." This conclusion has been reached in all but one of the federal court cases interpreting Section 253 of the Act.[17] Although the size of a carrier's network may have some bearing on the potential revenues it receives, a local government's

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[16] A history of the ill-fated 'parity provision' is discussed at length in *AT&T Communications of the Southwest, Inc. v. City of Dallas,* 8 F. Supp.2d 582, 594 (N.D. Tex. 1998).

[17] See *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998), *AT&T Communications of the Southwest v. City of Dallas, Texa*s, Civ. No. 3:98-CV-0003-R (N.D. Tex. May 17, 1999); *Prince George's County*, 49 F. Supp. 2d at 818. *But see* TCG v. City of Dearborn, 16 F. Supp. 2d 785, 792-93 (E.D. Mich., 1998).

actual costs of managing its rights-of-way bears no relation to the financial success of the carriers that use those rights-of-way. Indeed, one can argue that revenue percentages on their face are not fair and reasonable, since they do not relate to a local government's cost of managing the rights-of-way, and therefore inherently violate Section 253.

In reaction to court decisions assailing the percentage-of-revenue fee, one jurisdiction has suggested to Level 3 that a reasonable franchise fee would have to be based on the number of fiber strands that Level 3 installs in it's network. Level 3 recognizes that a city may reasonably assess fees based on the amount of space occupied or burdened by a carrier's network. However, to suggest that the municipality's costs are somehow related to the number of strands in a carrier's network, when one strand is roughly the width of a hair, is absurd. Moreover, a per-strand fee increases unfairly as new entrants install increasingly high capacity networks to meet the remarkable growth in demand for access to the Internet. Such growth is not the consequence of anything local governments have done to make their rights-of-way more valuable. Rather, it is the result of industry developments in computer software, telecommunications equipment, and fiber optic technology. To permit the cities to assess fees on a per-strand basis would constitute an unfair windfall that would consequently violate Section 253. In addition, a per-strand or per-conduit fee may create a disincentive for entrants to install the broadband networks that our economy is demanding. Schemes that tie municipal fees to quantities of fiber or conduit may also be viewed as an attempt to impose fees on services provided outside the franchising authority own jurisdiction.

Such a fee would be a serious imposition on interstate commerce, and for all of the above reasons should not be permitted.

D. Many States violate Section 253(b) by enforcing discriminatory policies regarding access to public rights-of-way.

Section 253(b) provides that nothing in that section shall "affect the ability of a State to impose, on a competitively neutral basis and consistent with Section 254 ... requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[18] Many States require telecommunications carriers to obtain consent of local government agencies before commencing construction of lines and other facilities. Often this is a condition of a carrier's certificate of public convenience and necessity. However, in requiring local authorizations, the States become legally responsible for local right-of-way management.

Incumbent local exchange carriers usually have an advantage over competitors in access to public rights-of-way, because they are often charged nothing for access to public rights-of-way, and rely on state law to maintain this advantage. One tactic of the ILECs has been to make a dubious claim of right to a "perpetual franchise," purportedly granted by the state government in the distant past, in one instance more than a century ago. Bell Atlantic utilized that tactic when it sought to overturn the Prince George's County franchise ordinance by claiming that "pursuant to the Act of

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[18] 47 U.S.C. § 253(b).

1868, as amended, Bell Atlantic - Maryland was offered a statewide franchise in perpetuity to construct its lines along the roads, streets and highways within the State of Maryland. . . . The franchise required no fee and was granted in perpetuity."[19] Level 3 has learned that Bell Atlantic makes a similar claim of "perpetual rights" in at least some parts of New York State. The States have the ability to challenge, repeal, or renegotiate the ILECs' so-called perpetual rights. Or, if they choose to continue granting free access to public rights-of-way for incumbent carriers, then 253(b) requires them to extend the same terms to new entrants.

E. State and local jurisdictions that are concerned with adequately managing their public rights of way are not prevented from doing so.

In the Notice of Inquiry, the Commission noted that a small number of States have enacted guidelines to local governments, limiting their ability to impose onerous fees and other conditions.[20] Regrettably, even among the four States cited by the Commission, one (Louisiana) affords protection against unreasonable and discriminatory fees only in connection with the state's own controlled access highways. Municipalities in Louisiana continue to demand unreasonable fees from new entrants while exempting the incumbent local exchange carriers.

In addition to the States noted by the Commission in the Notice of Inquiry, Level 3 observes that New Jersey has enacted a pro-competitive statute, which provides as follows:

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[19] Memorandum in Support of Plaintiff's Motion for Preliminary Injunction at 3, *Prince George's County,* 49 F. Supp. 2d 805 (D. Md. 1999) (No. JFM98 CV 4187).

[20] Notice of Inquiry at 45, n. 201.

> No municipal, regional, or county governmental agency may impose any fees, taxes, levies or assessments in the nature of a local franchise, right of way, or gross receipts fee, tax, levy or assessment against . . . telecommunications companies. Nothing in this section shall be construed as a bar to reasonable fees for actual services made by any municipal, regional or county governmental entity.[21/]

The State of Minnesota has focused on the essential aspect of preserving public streets and highways from damage and degradation. In 1997 the Minnesota legislature affirmed by statute the right of local government units to manage their public rights-of-way and recover their management costs.[22/] The same statute empowered the Minnesota Public Utilities Commission to convene an advisory task force and impose rules to establish statewide uniformity in right-of-way construction standards, where appropriate. The task force included engineering and other experts representing, in equal proportions: (1) local government units; and (2) affected utilities and other users of the public rights of way. Upon conclusion of the state rulemaking, new regulations were issued which apply to all right-of-way users. The Minnesota rule addresses issues traditionally stated by local governments as among their legitimate management concerns: restoration standards after digging and trenching; performance bonds and security funds required to ensure completion; indemnification of the local government unit against losses; procedures for dealing with congestion of the rights-of-way; what to do with abandoned facilities; recovery of costs for degradation of pavement; and

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[21/] N.J. Stat. Ann. § 54:30A-124 (West 1999).

[22/] Minn. Stat. § 237.163 (1997).

requirements for maps and drawings of the carriers' planned route through local governments' rights-of-way.[23]

F. The Commission possesses ample authority to issue rules interpreting the provisions of Section 253.

The Commission observed in the *Notice of Inquiry* that Section 253(d) does not "on its face grant the Commission any direct authority over Section 253(c)."[24] That assessment understates the FCC's discretion in this matter. First, as Level 3 has shown, state and local actions routinely violate Section 253(a) and (b), both of which are clearly within the preemptive jurisdiction of the Commission to enforce. Moreover, the United States Supreme Court has recently confirmed the broad authority possessed by the FCC to implement competitive provisions under Title II of the Act. In *AT&T Corp. v. Iowa Utilities Board*, the Supreme Court held that the FCC has general jurisdiction to implement the Act's local competition provisions.[25] As shown by Level 3 in these comments, access to municipal rights-of-way is an essential aspect of local competition, and closely tied to the traditional relationships between local governments and incumbent carriers.

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[23] *In re Planned Rules Governing Uniform Statewide Standards for Users of Public Rights-of-Way*, Minn. Pub.Util.Comm., Docket No. U-999/R-97-902 (issued Oct. 18, 1998).

[24] *Notice of Inquiry*, at ¶ 73.

[25] ___ U.S. ___, 119 S.Ct. 721, 724 (1999).

III. CONCLUSION

A. *The Commission should encourage positive State and local action.*

The New Jersey and Minnesota examples show that states can take positive steps to encourage competitive markets carriers of unreasonable local restrictions. However, leadership from the FCC is needed, because unfair, discriminatory and obstructionist local statutes are more common than the pro-competitive legislation found in a few jurisdictions. The FCC should urge the states, through the National Association of Regulatory Utility Commissions, to develop a model law and model regulations that would effectuate the Act's goal of encouraging competition in local markets.

B. *The Commission should release workable rules interpreting Section 253(a) and 253(b):*

Level 3 has concluded, on the basis of its extensive experience with municipal franchising authorities, that FCC rulemaking is required. As discussed in the comments above, municipal franchising authorities have imposed, and continue to impose, regulations that discriminate against new entrants and may constitute a barrier to entry for competitive telecommunications carriers. The State governments that allow the continuation of ILECs' favored positions, under so-called "perpetual franchises," are as responsible as the local governments for the current problems. Accordingly, under its authority contained in Section 253(d) of the Act, the Commission should determine that:

(a) State and local governments may reasonably assess fees based on their costs incurred in managing the public ways, provided that such fees are fair, reasonable, competitively neutral, and non-discriminatory;

(b) to be fair, reasonable, competitively neutral and non-discriminatory, a municipal franchise fee must be cost-based;

(c) percentage-of-revenue fees, as well as per-fiber-strand and per-conduit fees bear insufficient relationship to local governments' cost of managing the public rights-of-way, and are inherently unfair and illegal under Section 253(a); and

(d) any material difference in compensation between the incumbents and new entrants is discriminatory and inherently a barrier to entry, and therefore prohibited under Section 253(a) and (c) of the Act.

Respectfully submitted,

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